

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-269

In re Application of

ST. CROIX
WIRELESS CO.
A Limited Partnership

File No. BPH-850711QD

For Construction Permit
for a New FM Station at
Christiansted, Virgin Islands

MEMORANDUM OPINION AND ORDER

Adopted: July 9, 1990;

Released: July 18, 1990

By the Commission:

1. Before the Commission for consideration are a Memorandum Opinion and Order, *St. Croix Wireless Co.*, 3 FCC Rcd 4073 (1988); a Petition for Reconsideration and Motion for Stay, filed August 1, 1988, and supplemented on August 9, 1988 by *St. Croix Wireless Co. (SCWC)*, and an Opposition filed August 15, 1988 by *Sugarbird Communications*.

2. In *St. Croix Wireless Co.*, FCC 87M-2123 (Sept. 8, 1987) the ALJ dismissed *Sugarbird's* application for failure to prosecute. The ALJ separately approved a settlement between SCWC and the other remaining applicants and terminated the proceeding. *St. Croix Wireless Co.*, FCC 87M-4124 (Sept. 8, 1987). The Review Board rejected *Sugarbird's* appeal of the ALJ's dismissal of its application. *St. Croix Wireless Co.*, 3 FCC Rcd 1046 (1988). *Sugarbird* then appealed to the Commission.

3. The Commission concluded that the ALJ should have accepted *Sugarbird's* late-filed notice of appearance. It therefore reinstated *Sugarbird's* application and approved the settlement agreement previously filed by *Sugarbird* and SCWC with the ALJ as part of the universal settlement of this case. *St. Croix Wireless Co.*, 3 FCC Rcd 4073 (1988). Under the terms of the settlement, within 30 days after a decision approving SCWC's application becomes final, SCWC is obligated to pay *Sugarbird* \$12,500 for the dismissal of its application and its agreement to forego further prosecution of its application. SCWC now argues that the Commission should grant reconsideration of its order approving the settlement agreement with *Sugarbird*, because operation on the FM channel allocated to Christiansted will conflict with an FM station operating on the same channel in the British Virgin Islands, and because SCWC will be unable to build its proposed station until the conflict with that station is resolved. It asserts that the Commission was unaware of the conflict with the British Virgin Islands station when it approved the settlement agreement on July 1, 1988.

4. In support of its Petition for Reconsideration and Motion for Stay, SCWC submitted an affidavit from its principal, John T. Galanes, detailing his efforts first to obtain a construction permit and later to clear up the conflict with the British Virgin Islands station. Mr. Galanes asserts that he became concerned in February 1988, five months after the release of the ALJ's order granting SCWC's application, when SCWC had not received a construction permit. He then contacted the Mass Media Bureau and was advised of the conflict with the British Virgin Islands station. He was told that SCWC's permit would be modified to specify a new channel. The Bureau, however, has not initiated a rule making to specify a new channel for Christiansted. Mr. Galanes contacted the Mass Media Bureau on April 6, May 10 and July 22, 1988, and on each instance was told that the conflict had not been resolved. Affidavit attached to Petition for Reconsideration and Stay at 2.

5. SCWC's request for reconsideration will be denied. *Sugarbird* filed its appeal with the Commission, requesting reinstatement of its application and approval of its previously filed settlement agreement with SCWC, on April 8, 1988. SCWC did not file any pleading concerning *Sugarbird's* appeal or the request for approval of the settlement agreement. However, SCWC's own affidavit makes it clear that SCWC became aware of the conflict with the British Virgin Islands station in February 1988 and that the conflict had not been resolved by the time *Sugarbird* sought approval of its settlement agreement with SCWC. Moreover, in spite of the fact that SCWC's application had already been granted by the ALJ and that it would be obligated to pay *Sugarbird* \$12,500 upon approval of the settlement agreement, SCWC made no effort to inform the Commission of the conflict with the British Virgin Islands station that it was working with the Mass Media Bureau to resolve until after the Commission approved the settlement agreement.

6. The arguments in SCWC's request for reconsideration are untimely. SCWC has known about the conflict with the British Virgin Islands station since February 1988. Thus, SCWC does not rely on new information or on facts previously unknown to SCWC as required by the Commission's rules. 47 C.F.R. § 1.106(c)(1). Moreover, SCWC's petition asks the Commission to abrogate its obligations under the settlement agreement. The agreement is a private contractual arrangement freely entered into by the parties. *Anax Broadcasting, Inc.*, 88 FCC 2d 608, 611 ¶ 10 (1981). That agreement obligated SCWC to pay *Sugarbird* \$12,500 in return for foregoing further prosecution of *Sugarbird's* application, without providing for contingencies that could prevent construction of its proposed station. Although the Commission is authorized to approve settlement agreements, the question of whether a valid and binding contract exists is one of state contract law. *Ninety - Two Point Seven Broadcasting, Inc.*, 55 RR 2d 607, 610 ¶ 8 (1984). Thus, SCWC's arguments concerning whether the settlement agreement should be implemented provide no basis for a grant of reconsideration of our order approving that agreement.

7. ACCORDINGLY, IT IS ORDERED, that the Petition for Reconsideration and Motion for Stay¹ filed August 1, 1988 and supplemented on August 9, 1988 by *St. Croix Wireless Co.* IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

¹ Under 47 C.F.R. § 1.44(e), a request to stay the effectiveness of any action by the Commission, if not filed as a separate pleading, will not be considered by the Commission. In any event, even if treated as properly filed, SCWC's request makes no showing warranting grant of a stay.